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FEDERAL COMMUNICATIONS COMMISSION
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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In The Matter of)

Competitive Telecommunications Association)
Florida Competitive Carriers Association and)
Southeastern Competitive Carriers Association)

Petition on Defining Certain Incumbent LEC)
Affiliates as Successors, Assigns, or)
Comparable Carriers Under Section 251(h))
of the Communications Act)

CC Docket No. 98-39

**REPLY COMMENTS OF THE
TELECOMMUNICATIONS RESELLERS ASSOCIATION**

The Telecommunications Resellers Association ("TRA"), through undersigned counsel and pursuant to *Public Notice*, DA 98-627 (released April 1, 1998) and *Order Extending Time To File Reply Comments*, DA 98-867 (released May 8, 1998), hereby replies to oppositions (collectively "Oppositions") filed in the captioned proceeding by incumbent local exchange carriers ("LECs") and their trade associations (the "Incumbent LEC Opponents")¹ to the pending Competitive Telecommunications Association, Florida Competitive Carriers Association, and Southeastern Competitive Carriers Association (collectively, "Petitioners") Petition for Declaratory Ruling or, in the Alternative, for Rulemaking ("Petition").

¹ Oppositions to the Petition were submitted by Ameritech Corporation ("Ameritech"), the Bell Atlantic telephone companies ("Bell Atlantic"), BellSouth Corporation ("BellSouth"), GTE Service Corporation ("GTE"), the National Telephone Cooperative Association ("NCTA"), the Independent Telephone & Telecommunications Alliance ("ITTA"), SBC Communications, Inc. ("SBC"), and the United States Telephone Association ("USTA").

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In their Oppositions, the Incumbent LEC Opponents, relying principally on the Commission's *Non-Accounting Safeguards Order*, as well as definitions drawn from other inapplicable contexts,² contend that an affiliate of an incumbent LEC which markets local exchange service within the incumbent LEC's local service area using the incumbent LEC's logo and service brand is not a "successor or assign" of the incumbent LEC under Section 251(h)(1)(B)(ii) of the Communications Act of 1934, as amended by the Telecommunications Act of 1996 (the "Act").³ The Incumbent LEC Opponents further assert that such affiliates are not "comparable" to incumbent LECs under the statutory criteria established by Section 251(h)(2) of the Act.⁴ Finally, the Incumbent LEC Opponents contend that public policy considerations argue against grant of the relief sought by Petitioners. TRA disagrees on all counts.

A. An Affiliates of an Incumbent LECs that Provides Local Exchange Service Within the Incumbent LECs' Local Service Areas is Properly Classified as a "Successor or Assign" of the Incumbent LEC

Contrary to the Incumbent LEC Opponents claims,⁵ the Commission's *Non-Accounting Safeguards Order* does not require denial of the Petition; rather, it provides strong support for grant of the relief sought by Petitioners. In its *Non-Accounting Safeguards Order*, the Commission declined to impose Section 251(c) obligations on an incumbent LEC affiliate simply

² Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934 (First Report and Order), 11 FCC Rcd. 21905, ¶ 309 (1996), *recon.* 12 FCC Rcd. 2297 (1997), *further recon. pending, remanded in part sub nom. Bell Atlantic Tel. Cos. v. FCC*, Case No. 97-1067 (D.C. Cir. Mar. 31, 1997), *further recon on remand* 12 FCC Rcd. 15756 (1997), *aff'd sub nom Bell Atlantic Tel. Cos. v. FCC*, 131 F.3d 1044 (D.C. Cir. 1997).

³ 47 U.S.C. § 251(h)(1)(B)(ii); Pub. L. No. 104-104, 110 Stat. 56, § 101 (1996).

⁴ 47 U.S.C. § 251(h)(2).

⁵ See, e.g., Oppositions of Ameritech at 5-9, Bell Atlantic at 2-4, BellSouth at 2-7, SBC at 4-5, and SNET at 3-6.

because it provided local exchange services within the incumbent LEC's local service area or to bar an incumbent LEC from transferring "key local exchange and exchange access services and facilities" to an affiliate.⁶ The Commission nonetheless recognized that such actions raised "legitimate concerns" regarding the potential "eva[sion of] . . . section . . . 251."⁷ The Commission, accordingly, ruled that "if a BOC transfers to an affiliated entity ownership of any network elements that must be provided on an unbundled basis pursuant to section 251(c)(3)," it would be deemed to be "an 'assign' of the BOC under section 3(4) of the Act with respect to those network elements."⁸ The Commission did not, however, limit the scope of the terms "successor" and "assign" to an incumbent LEC affiliate to which the incumbent LEC has transferred ownership of a network element.⁹ Indeed, the Commission appeared to contemplate that these terms would have a far more extended reach.

Unlike the Incumbent LEC Opponents, TRA reads the Commission's *Non-Accounting Safeguards Order* to require treatment as a "successor or assign" of an incumbent LEC any incumbent LEC affiliate to which is transferred ownership or beneficial use of any asset central to the incumbent LEC's dominant market position.¹⁰ Or to borrow a phrase coined by BellSouth,

⁶ Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934 (First Report and Order), 11 FCC Rcd. 21905 at ¶¶ 310, 312.

⁷ Id. at ¶ 309.

⁸ Id.

⁹ Id. at ¶ 305 ("Thus, if an affiliate provided local exchange service through its own facilities or by reselling the BOC's local exchange service, it would *not necessarily* be classified as an incumbent LEC." (emphasis added)).

¹⁰ This definition of "successor or assign" is not, as suggested by the Incumbent LEC Opponents, coextensive with the statutory definition of affiliate, which includes all instances of meaningful common ownership. See 47 U.S.C. § 153(33). Rather, the former represents a limited subsection of the latter.

treatment of an incumbent LEC affiliate as a "successor or assign" of an incumbent LEC is appropriate when the affiliate "takes on an essential attribute of an ILEC."¹¹ This reading, TRA submits, directly addresses the "legitimate concerns" expressed by the Commission that incumbent LECs might seek to evade their Section 251 obligations through strategic asset transfers and transactional machinations. To this end, the Commission, as noted above, expressly concluded that an incumbent LEC affiliate to which the incumbent LEC transfers an element of the incumbent LEC's bottleneck facilities will be deemed an "assign" of the incumbent LEC with respect to that network element.¹² It is thematically consistent to deem to be a "successor or assign" of the incumbent LEC an incumbent LEC affiliate which is allowed beneficial use of one of the incumbent LEC's most valuable competitive assets -- *i.e.*, the incumbent LEC's logo and service brand and the associated name recognition and good will accrued from decades as the exclusive provider of local service -- an "assign" of the incumbent LEC with respect to all services marketed under that logo and service brand. As TRA argued in its Comments, apart from their exclusive control of network facilities, ubiquitous access to customers and brand identification are the two most formidable competitive advantages held by incumbent LECs.

TRA thus agrees with the Incumbent LEC Opponents that the Commission's *Non-Accounting Safeguards Order* can be read to be dispositive of the matters raised by the Petitioners. The outcome, however, would be directly contrary to that asserted by the Incumbent LEC Opponents, supporting grant of the relief sought by Petitioners rather than foreclosing it. Obviously, since the *Non-Accounting Safeguards Order* can be, and is better, read to be entirely consistent with

¹¹ Comments of BellSouth at 15.

¹² Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934 (First Report and Order), 11 FCC Rcd. 21905 at ¶ 309.

the relief sought by Petitioners, the Incumbent LEC Opponents' claims that the Petition constitutes an untimely petition for reconsideration of that order is without merit. Equally without merit are suggestions by the Incumbent LECs that Petitioners seek a rule change under the guise of a request for a declaratory ruling. As discussed above, the declaratory ruling sought by Petitioners flows directly from existing Commission rules and policies.

The Incumbent LEC Opponents, however, seek to apply definitions of “successors” and “assigns” from other contexts, arguing that an incumbent LEC must have divested itself of key assets or have been substantially replaced by a local exchange affiliate to be encompassed within these definitions.¹³ It is well settled that statutory provisions should be construed in harmony with the statutory purpose.¹⁴ The interpretation of Section 251(h) proffered by Petitioners is consistent with, indeed, is necessary to the achievement of, the overall objective of the Telecommunications Act of 1996 “to open all telecommunications markets to competition.”¹⁵ Even more critically, this reading of Section 251(h)(1)(B)(ii) is essential to the realization of the “primary purpose” of Section 251 which is “to foster competition that otherwise would not likely develop in local exchange and exchange access markets.”¹⁶ If Incumbent LECs can readily avoid their Section 251(c) obligations

¹³ See, e.g., Oppositions of Ameritech at 2-16, Bell Atlantic 4-5, GTE at 5-9, USTA at 2-6.

¹⁴ U.S. v. Articles of Drug . . . Bacto-Unidisk, 394 U.S. 784 (1969), *rehearing denied* 395 U.S. 954 (1970); Spilker v. Shayne Lab., Inc., 520 F.2d 523 (9th Cir. 1975); Baldrige v. Hadley, 491 F.2d 859 (10th Cir. 1974), *cert. denied* 417 U.S. 910 (1974); U.S. v. State of Maryland for Use of Meyer, 349 F.2d 693 (D.C.Cir. 1965); C.I.R. v. Kelley, 293 F. 2d 904 (5th Cir. 1961).

¹⁵ Application of Ameritech Michigan Pursuant to Section 271 of the Communications Act of 1934, as amended, to Provide In-Region, InterLATA Services in Michigan (Memorandum Opinion and Order), 12 FCC Rcd. 20543, ¶ 10 (1997).

¹⁶ Guam Public Utilities Commission Petition for Declaratory Ruling Concerning Section 3(37) and 251(h) of the Communications Act (Order), 12 FCC Rcd. 6925, ¶ 41 (1997).

through strategic asset transfers and other transactional machinations, local exchange and exchange access competition is not likely to develop.

But the Incumbent LEC Opponents assert, Petitioners' proffered interpretation of Section 251(h)(1)(B)(ii) is "wholly illogical" because a non-facilities-based Incumbent LEC affiliate would not be able to deliver unbundled network elements or provide physical interconnection to network facilities.¹⁷ TRA disagrees. Such an incumbent LEC affiliate "successor or assign" could satisfy these Section 251(c) obligations by essentially serving as a conduit between the incumbent LEC and an unaffiliated competitive provider. Thus, the incumbent LEC affiliate "successor or assign" would provide physical network interconnection by ordering such interconnection from the incumbent LEC and providing it, in accordance with 251(c)(2), to the requesting carrier. Likewise, unbundled network elements could simply be passed through as obtained from the incumbent LEC. Because it provides retail services, however, the incumbent LEC affiliate would, however, be required to provide such services for resale at the mandated wholesale discount off its retail rates, bearing in mind that the underlying purpose is to prevent evasion by the incumbent LEC of its Section 251(c) duties. Thus, by way of illustration, the incumbent LEC would not be able to effectively avoid providing contract service arrangements ("CSAs") at wholesale discounts simply by providing these offerings through a local service affiliate because the affiliate would be required to provide such offerings to competitive providers at wholesale rates.¹⁸

¹⁷ See, e.g., Opposition of SBC at 6.

¹⁸ Even if an incumbent LEC's local service affiliate were to set its prices at the incumbent LEC's wholesale rate, it would be a win-win situation for the incumbent LEC and its corporate parent unless the affiliate is required to offer its retail services for resale at wholesale rates. If the affiliate has no such obligation and prices its services at the wholesale rate of the incumbent LEC, the incumbent LEC (and hence its corporate parent) will receive the same revenues as if the service had been purchased by a unaffiliated resale carrier, with the added benefit that resale competition will be defeated because no resale carrier will be able to match the affiliate's price.

But, the Incumbent LEC Opponents further opine, logos and service brand generally belong to the corporate parents of the incumbent LEC and hence are not being provided by the incumbent LEC to the local service affiliate.¹⁹ TRA submits that the ultimate ownership of the logo and service brand under which an incumbent LEC offers its local exchange services is not the dispositive consideration. If an incumbent LEC has beneficial use of the logo and service brand, the logo and service brand are competitive assets of the incumbent LEC. As assets central to the incumbent LEC's dominant market position, their use by an affiliate renders that affiliate a "successor or assign" of the incumbent LEC. As noted above, the critical issue is whether the incumbent LEC has transferred to an affiliate providing local exchange service within its local service area the ownership or beneficial use of any asset central to the incumbent LEC's dominant market position.

B. An Affiliate of an Incumbent LEC that Provides Local Exchange Service Within the Incumbent LECs' Local Service Area Assumes the Mantle of the Incumbent LEC

The Incumbent LEC Opponents also vigorously oppose Petitioners' alternate request that the Commission initiate a rulemaking to adopt a rule that an incumbent LEC affiliate which markets local exchange service in the incumbent LEC's local service area using the incumbent LEC's logo and service brand is a "comparable carrier" under Section 251(h)(2).²⁰ The Incumbent LECs, however, predicate their opposition on an unduly narrow reading of the criteria established by Section 251(h)(2) pursuant to which the Commission "may, by rule, provide for the treatment of a local exchange carrier (or class or category thereof) as an incumbent local exchange carrier." Section 251(h)(2) allows for a much broader reading.

¹⁹ See, e.g., Oppositions of Ameritech at 10, BellSouth 9-10.

²⁰ See, e.g., Oppositions of Ameritech at 19-23, BellSouth at 19-21, GTE at 16-18, SBC at 8-10, SNET at 10-12, USTA at 8-9.

Under Section 251(h)(2), the Commission may treat a local service affiliate of an incumbent LEC as an incumbent LEC if (i) the affiliate occupies a position in the local market comparable to that occupied by the incumbent LEC, (ii) it substantially replaces the incumbent LEC in the local market, and (iii) the public interest would be furthered by such treatment. The Incumbent LEC Opponents argue that to satisfy the first criteria, the local service affiliate must have acquired network facilities comparable to those of the incumbent LEC. TRA submits that when an affiliate of an incumbent LEC markets local exchange service in the incumbent LEC's local service area under the incumbent LEC's logo and service brand, it assumes the mantle of the incumbent LEC. By availing itself of the key attributes of the corporate identity of the incumbent LEC, the affiliate takes a position in the local market comparable to that occupied by the incumbent LEC.

The Incumbent LEC Opponents next claim that for the second criteria to be satisfied, the incumbent LEC must have exited the market in which its local affiliate is providing local exchange service. As Petitioners correctly point out, a better reading of the second criteria allows for its satisfaction on a customer-specific basis. In other words, an affiliate of an incumbent LEC which markets local exchange service within the incumbent LEC's local service area under the incumbent LEC's logo and service brand replaces the incumbent LEC as to each customer to which it provides local service. Again, it is because the affiliate has essentially assumed the marketplace identity of the incumbent LEC that it should be deemed to have replaced the incumbent LEC with respect to the customers to which it provides services.

Finally, as set forth in the following section, the public interest would be well served by closing what the Incumbent LEC Opponents perceive to be an immense loophole in Section 251.

C. The Public Interest Would Not be Well Served by Sanctioning Avoidance by Incumbent LECs of Their Section 251(c) Duties

The Incumbent LEC Opponents vigorously argue that the public interest would be well served by freeing their local exchange affiliates of all Section 251(c) obligations, contending that such action would increase competitive choices for consumers.²¹ The Incumbent LEC Opponents' argument, however, proves too much. Any additional benefits that might be brought to the consuming public by an incumbent LEC affiliate providing local exchange service in an incumbent LEC's local service area could be secured just as easily without use by the affiliate of the incumbent LEC's logo and service brands.

Allowing a local service affiliate to use the logo and service brand of an incumbent LEC would introduce no additional benefits for the public beyond any that might be generated by the affiliate's provision of local service without such use. Rather, all benefits associated with the affiliate's use of the incumbent LEC's logo and service brand are purely private benefits which accrue solely to the affiliate and the incumbent LEC, as well as their corporate parent. Thus, there are no associated benefits to offset the adverse competitive impacts of allowing a local service affiliate to use the logo and service brand of an incumbent LEC without imposing upon such affiliate the Section 251(c) obligations of the incumbent LEC.

The adverse competitive impacts of any means by which an incumbent LEC could avoid its Section 251(c) obligations are manifest. The "primary purpose" of Section 251, as noted above, is "to foster competition that otherwise would not likely develop in local exchange and exchange access markets."²² As discussed previously, a local service affiliate of an incumbent LEC

²¹ *See, e.g.,* Oppositions of GTE at 19-21, SBC at 10-12, SNET at 12-14, USTA at 10.

²² Guam Public Utilities Commission Petition for Declaratory Ruling Concerning Section 3(37) and 251(h) of the Communications Act (Order), 12 FCC Rcd. 6925 at ¶ 41.

unencumbered by Section 251(c)(4) obligations could, at a minimum, defeat resale competition by simply pricing its retail offerings at the wholesale price of the incumbent LEC.²³ Indeed, an incumbent LEC could elect to provide all retail services through its local service affiliate (to which it would provide only wholesale services) and thereby avoid its resale obligations altogether. As the Commission has recognized, "during the transition from monopoly to competition . . . vigilant[] and vigorous[] enforce[ment]" of Section 251(c) and the Commission's implementing rules is vital if Congressional market-opening objectives are to be achieved.²⁴ Sanctioning avoidance by the incumbent LECs of their Section 251(c) obligations obviously is the antithesis of such vigilant and vigorous enforcement.

D. Conclusion

By reason of the foregoing and the matters addressed in its earlier-filed Comments, the TRA urges the Commission to grant the relief requested by Petitioners and declare an incumbent LEC successor or assign an incumbent LEC affiliate using the incumbent LEC logo and service brand in offering local exchange service within the incumbent LEC's local service area, or, in the

²³ See, e.g., Application of BellSouth Corporation, et al. Pursuant to Section 271 of the Communications Act of 1934, as amended, to Provide In-Region, InterLATA Services in Louisiana, CC Docket No. 97-231, FCC 98-17, ¶ 68 (released Dec. 24, 1997), *recon. pending, appeal pending sub. nom. BellSouth Corporation v. FCC*, No. 98-1087 (D.C.Cir. March 6, 1998) (failure to offer services at a wholesale discount "may impede one of the three methods Congress developed for entry into the BOCs' monopoly market.").

²⁴ Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, 11 FCC Rcd. 15499, ¶ 20 (1996), *recon.* 11 FCC Rcd. 13042 (1996), *further recon.* 11 FCC Rcd. 19738 (1996), *further recon.*, FCC 97-295 (Oct. 2, 1997), *aff'd in part, vacated in part sub. nom. Iowa Utilities Board v. FCC*, 120 F.3d 753 (1997), *modified* 1997 U.S. App. LEXIS 28652 (8th Cir. Oct. 14, 1997), *cert. granted sub. nom. AT&T Corp. v. Iowa Utilities Board* (Nov. 17, 1997), *pet. for rev. pending sub. nom., Southwestern Bell Telephone Co. v. FCC*, Case No. 97-3389 (Sept. 5, 1997).

alternative, to initiate a rulemaking proceeding to adopt a rule that such an incumbent LEC affiliate is a "comparable carrier " under Section 251(h)(2).

Respectfully submitted,

**TELECOMMUNICATIONS
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By:

A handwritten signature in black ink, appearing to read "Charles C. Hunter", written over a horizontal line.

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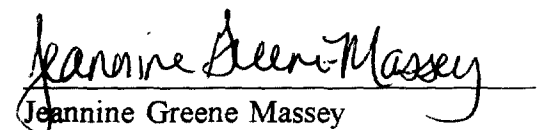
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